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Issue Date: 19 February 2004

CASE NO.: 2000-LHC-2878

OWCP NO.: 08-117647

DAVID A. DOYLE

Claimant

v.

ROWAN COMPANIES, INC.

Employer

and

RELIANCE NATIONAL INDEMNITY CO.

Carrier

SECOND SUPPLEMENTAL DECISION AND ORDER RESCINDING PRIOR ORDER

On October 3, 2001, a Decision and Order originally issued in this matter, which involved a claim under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq. (herein the Act), brought by David A. Doyle (Claimant) against Rowan Companies, Inc. (Employer) and Reliance National Indemnity Company (Carrier).

In the October 3, 2001 Decision and Order, it was determined that Claimant established entitlement to: (1) temporary total disability compensation benefits from January 21, 2000 to July 24, 2000 and from December 3, 2000 to January 3, 2001 based on his $696.06 average weekly wage; (2) temporary partial disability compensation benefits from July 25, 2000, to December 3, 2000, based on two-thirds of the difference between Claimant's $696.06 average weekly wage and his $386.93 residual wage-earning capacity; (3) temporary partial disability compensation benefits from January 4, 2001, and continuing,

based on two-thirds of the difference between Claimant's $696.06 average weekly wage and a $280.00 residual wage-earning capacity, for a weekly compensation rate of $277.35 (($696.06 - $280.00) x .6666 = $277.35); (4) reasonable, appropriate and necessary medical expenses arising from his December 28, 1999 job injury; and (5) interest on any sums due and owing. Employer/Carrier were entitled to a credit for any compensation paid, while Counsel was provided time to file a proper fee petition in consideration of his successful prosecution on Claimant's behalf. On November 13, 2001, Employer/Carrier filed their Notice of Appeal.

On January 25, 2002, after briefs on an attorney's fee were filed with this office by Claimant's attorney, Quentin D. Price (Counsel), and by Employer/Carrier, a Supplemental Decision and Order Awarding Attorney's Fees issued in which Counsel was awarded $20,890.50, Ed W. Barton was awarded $4,583.38 and the Law Firm of Barton, Price and McElroy was awarded $1,963.61 for their reasonable and necessary attorneys' fees and costs on Claimant's behalf before this office. Thus, Counsel was awarded a total of $27,437.49 ($20,890.50 + $4,583.38 + $1,963.61 = $27,437.49).

On November 6, 2002, the Board vacated the October 3, 2001 award of temporary partial disability compensation benefits subsequent to January 4, 2001, when Claimant worked post-injury for Shamrock Equipment Rental Company (Shamrock), because: (1) Claimant's testimony about his overtime work was not previously considered, nor was (2) his actual post-injury wages paid by Shamrock and (3) the undersigned did not render a finding as to whether Claimant's actual post-injury earnings reasonably represent his wage-earning capacity. In all other respects, the October 3, 2001 Decision and Order was affirmed.

On February 12, 2003, the record in this matter was received from the Board. On February 18, 2003, an Order Denying Motion to Quash issued by the undersigned in which Claimant's motion to quash a subpoena was rejected because Claimant's actual wage earnings from Shamrock after January 4, 2001 to present were determined to represent the best evidence of Claimant's residual wage-earning capacity. On March 13, 2003, Claimant submitted a one-page medical report from Dr. Charles B. Clark, III indicating Claimant could not return to work.

On May 28, 2003, a Decision and Order on Remand issued by the undersigned in which it was determined Claimant's weekly wage-earning capacity was no less than $563.52 during all

periods after January 4, 2001 through present and continuing. Employer/Carrier were ordered to pay Claimant temporary partial disability compensation benefits at the following weekly compensation rates: (1) $62.90 from January 4, 2001 through September 30, 2001; (2) $76.30 from October 1, 2001 through December 31, 2001; (3) $76.50 from January 1, 2002 through September 30, 2002; (4) $88.35 from October 1, 2002 through December 31, 2002; and (5) $54.27 from January 1, 2003 through present and continuing.

On July 2, 2003, an Order Denying Claimant's Motion for Reconsideration was issued. The May 28, 2003 Decision and Order on Remand and the July 2, 2003 Order Denying Claimant's Motion for Reconsideration provided no deadlines within which Counsel should file a fully supported and verified fee petition.

On August 11, 2003, Claimant filed an appeal with the Benefits Review Board. On September 9, 2003, Counsel filed an Attorney's Fee application for services before this office related to the prosecution of the claim on remand. On November 20, 2003, after no opposition was filed by Employer/Carrier, a Supplemental Decision and Order Awarding Attorney's Fees issued in which Counsel was awarded $3,937.50 representing 17.50 hours of service at an hourly rate of $225.00 for the period of time after this matter was remanded by the Board to this office on February 6, 2003 and $179.00 in expenses as itemized for a total of $4,116.50.

On December 15, 2003, Employer/Carrier filed a Motion to Reconsider Award of Attorney's Fees. They averred an award was inappropriate for Counsel's efforts on remand because Claimant was unsuccessful, relying on Munguia v. Chevron U.S.A., Inc., 23 BRBS 180 (1990) (an award of attorney's fees is inappropriate where the Claimant has not been successful). Specifically, Employer/Carrier argued Claimant failed to establish his contention that he was totally disabled and that the Decision and Order on Remand awarded only a fraction of his previously awarded benefits.

On January 15, 2004, the undersigned issued an Order to Show Cause why Employer's Motion to Reconsider Award of Attorney's Fees should not be granted and why the Attorney's Fee award should not be rescinded.

On January 23, 2004, Counsel timely filed a Response to Employer/Carrier's Motion to Reconsider Award of Attorney's Fee in which he averred a fee award is appropriate because: (1)

Employer/Carrier remain liable for some compensation despite a "significantly higher" request by Claimant; (2) Munguia, supra, is inapplicable to this matter; and (3) he successfully defended Claimant's entitlement to benefits. He attached a Supplemental Application for Award of Attorney's Fee requesting an award for time necessary to defend his prior fee petition.

On January 27, 2004, Employer/Carrier filed their Reply to Claimant's Response to Employer/Carrier's Motion to Reconsider Award of Attorney's Fee and their Opposition to Claimant's Supplemental Fee Application. They argue an award for Counsel's services on remand would be erroneous because: (1) such an award would entitle an attorney to a fee award "at every stage in a compensation claim, regardless of his lack of success at that particular stage; and (2) Claimant established entitlement to less benefits than were previously awarded rather than additional benefits on remand. Likewise, Employer/Carrier argue Counsel did not successfully defend his fee petition, which precludes an award for his supplemental fee request.

DISCUSSION

For a fee to be awarded pursuant to Section 28(a), the claimant's attorney must engage in a "successful prosecution" of the claim. 33 U.S.C. § 928(a); 20 C.F.R. § 702.134(a); Perkins v. Marine Terminals Corp., 673 F.2d 1097 (9th Cir. 1982); Petro-Weld, Inc. v. Luke, 619 F.2d 418 (5th Cir. 1980).

The courts have also recognized that a claimant must be a "prevailing party" to recover an attorney's fee. Generally, a party is considered to have prevailed "if they succeed on any significant issue in litigation which achieves some sort of benefit the parties sought in bringing suit." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); Ezell v. Direct Labor, Inc., 33 BRBS 19 (1999), supra; See generally Landrum v. Air America, Inc., 534 F.2d 67 (5th Cir. 1976) (successfully establishing a permanent disability); Quave v. Progress Marine, 912 F.2d 798, on reh'g, 918 F.2d 33 (5th Cir. 1990) (successfully prosecuting claim for penalties and interest), cert. denied, 500 U.S. 916 (1991).

The "most critical factor is the degree of success obtained." Hensley, supra at 436. An attorney's fee award should be tailored to limited success obtained under Section 28(a) of the Act. Ingalls Shipbuilding, Inc. v. Director, OWCP, 991 F.2d 163, 166, (1993) (the Fifth Circuit vacated a claimant's award except for medical benefits related to one

medical evaluation) (citing Farrar v. Hobby, 506 U.S. 103 (1992); Hensley, supra; George Hyman Const. Co. v. Brooks, 963 F.2d 1532 (D.C. Cir. 1992). Attorney's fees may not be awarded for services rendered before a given tribunal **unless additional benefits have been awarded by that tribunal or on appeal from that tribunal.** Murphy v. Honeywell, Inc., 20 BRBS 68, 70 (1986) (an administrative law judge properly denied an award for an attorney's fee against the employer or carrier for work performed after remand because the claimant obtained no additional compensation as a result of these proceedings) (citing 33 U.S.C. § 928(a), (b); Kleiner v. Todd Shipyards Corp., 16 BRBS 297, 299 (1984)). See also National Steel & Shipbuilding Co. v. U.S. Department of Labor, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979); Flowers v. Marine Concrete Structures, Inc., 19 BRBS 162 (1986); Duhagon v. Metropolitan Stevedore Co., 31 BRBS 98 (1997) (an attorney was not entitled to a fee under Section 28(a) or (b) of the Act because he did not obtain additional benefits for the claimant); Wilkerson v. Ingalls Shipbuilding, Inc., 125 F.3d 904, 908 (5th Cir. 1997) (an attorney was entitled to no fee where he gained a claimant "nothing more than the $4,299.83 Ingalls had tendered before he brought the matter before the [Board]").

As noted in the Decision and Order on Remand, Claimant's primary argument was rejected that his post-injury wage-earning capacity was zero, pursuant to the testimony of Claimant and his wife as well as the medical report of Dr. Clark. On the other hand, Employer/Carrier argued Claimant's average weekly wages after January 4, 2001 were greater than $280.00 but less than his average weekly wage of $696.06, pursuant to the actual wages Claimant earned after January 4, 2001.

I was favorably impressed with Employer/Carrier's argument that Dr. Clark's opinion was entitled to little probative value. I agreed with Employer/Carrier's argument that the wage records of Shamrock established Claimant's wage-earning capacities for specific periods after January 4, 2001 through present and continuing. I also agreed with Employer/Carrier that there was insufficient evidence establishing Claimant was physically unable to perform work at Shamrock. Further, I found insufficient evidence establishing Claimant returned to work at Shamrock only through extraordinary effort. Accordingly, Claimant's primary argument that his post-injury wage-earning capacity was zero failed.

Claimant initially argues the undersigned issued the November 20, 2003 fee award because: "any" award is a

"successful prosecution" under the Act; (2) Munguia, supra, is inapplicable because he successfully prosecuted Claimant's claim on remand; and (3) he successfully defended Claimant's entitlement to compensation benefits. His argument is without merit because his fee award issued simply in the absence of objection by Employer/Carrier while this matter is currently under appeal.

Claimant next argues "any" award on remand is a "successful prosecution" pursuant to Section 28(a) of the Act because Claimant originally filed his claim for compensation on April 6, 2000, while Employer/Carrier paid no benefits to Claimant after March 16, 2000. In Richardson v. Continental Grain Co., 37 BRBS 80 (CRT) (2003), an attorney successfully established: (1) entitlement to compensation benefits of $932.00 for a claimant's knee injury, and (2) the claimant was not fabricating a back injury for which the employer voluntarily paid some prior compensation benefits. However, the employer previously offered to settle the claims for the back and knee injuries in exchange for a lump-sum payment of $5,000.00, which was refused by the claimant prior to the Board's finding that the claimant established entitlement to compensation benefits of $932.00. The Board denied the attorney's fee despite the $932.00 award "because $932.00 is less than the $5,000.00 tender." 37 BRBS at 81-82.

On appeal to the Ninth Circuit, the attorney in Richardson argued he was entitled to an attorney's fee under Section 28(a) because the employer, which unilaterally terminated voluntary payment of compensation benefits prior to the filing of a claim for additional benefits, did not offer to pay any additional benefits within thirty days after receiving notice of the claim for additional benefits. The Court agreed that Section 28(a) of the Act applied, noting that the employer did not tender a settlement offer until two years after the filing of the claim and that "the relevant time period we look to for determining whether the employer 'decline[d] to pay any compensation' begins with receiving notice of the claim, and ends thirty days after. 37 BRBS at 81 (citing Pool Co. v. Cooper, 274 F.3d 173, 186-87 (5th Cir. 2001)).

Nevertheless, the Court affirmed the Board's denial of an attorney's fee in Richardson because a finding that the claimant did not fabricate an injury did not equate to any relief, "nominal, injunctive, or otherwise" and because "$932 . . . [was] less than $5,000," noting that a party need not obtain monetary relief to prevail for purposes of such fee-shifting

statutes; however, "he must obtain some actual relief that 'materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" 37 BRBS at 82 (citing Farrar, supra at 111-12 (1992); Rhodes v. Stewart, 488 U.S. 1, 4 (1988) (per curiam) (succeeding on an issue alone is insufficient; even obtaining declaratory judgment will not result in the award of fees, unless it causes the defendant's behavior to change for the benefit of the plaintiff); Hewitt v. Helms, 482 U.S. 755, 761 (1987) (plaintiff does not prevail even though an interlocutory decision reversing a dismissal stated that plaintiff's rights were violated; to prevail, plaintiff must gain relief of substance, i.e., more than a favorable judicial statement that does not affect the relationship between the plaintiff and the defendant).

Like the facts presented in Richardson, Employer/Carrier voluntarily tendered compensation benefits until their decision to cease payment. Thereafter, Claimant utilized the services of an attorney to file a claim for additional compensation which Employer/Carrier declined to pay within the statutory deadline. Because Employer/Carrier were eventually ordered to pay compensation benefits of approximately $8,669.85 for Claimant's temporary partial disability status after January 4, 2001 on remand, Counsel arguably established entitlement to an award for an attorney's fee under Section 28(a) of the Act.

However, Claimant established entitlement to **lower** compensation benefits on remand than were previously awarded in the original October 3, 2001 Decision and Order, which awarded Claimant compensation benefits based on a weekly compensation rate of **$277.35** (($696.06 - $280.00) x .6666 = $277.35). Upon remand, Claimant's weekly compensation rates after January 4, 2001, were **no greater than $88.35**. At a $277.35 weekly compensation rate for all periods after January 4, 2001, Claimant would have been entitled to **$34,629.13** on May 28, 2003, when the Decision and Order on Remand issued.[1] After the unsuccessful argument that Claimant should be entitled to compensation benefits based on a residual wage-earning capacity of zero, the value of Claimant's entitlement as of May 28, 2003

[1] The period from January 4, 2001 through May 28, 2003 may be approximated by 874 days, or 124.86 weeks (874 days ÷ 7 days per week = 124.86 weeks). At a $277.35 weekly compensation rate, the total amount of Claimant's entitlement would thus amount to $34,629.13 ($277.35 x 124.86 weeks = $34,629.13).

may now be approximated as **$8,669.85,**[2] which is **$25,959.28 less** than the compensation benefits previously awarded ($34,629.13 - $8,669.85 = $25,959.28).

In light of the foregoing, I find Counsel failed to obtain any additional benefits on remand nor did he gain some actual relief that materially altered the legal relationship between the parties by modifying Employer/Carrier's behavior in a way that directly benefited Claimant. Accordingly, I find Counsel failed to successfully prosecute Claimant's claim on remand and is not entitled to an attorney's fee for his services on remand pursuant to Section 28(a) of the Act.

It is noted that Counsel already obtained a $27,437.49 attorney's fee award for the successful prosecution which resulted in the October 3, 2001 Decision and Order finding that Claimant established entitlement to compensation benefits, medical benefits and interest.

Counsel argues the holding of Munguia, supra, is inapplicable to the matter at hand because the Board determined the claimant's injury in Munguia was not covered under Section 3(a) of the Act, thereby precluding an award in the absence of jurisdiction. I find Counsel's argument is specious, without

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[2] Claimant's $62.90 weekly compensation rate for the 38.43-week period from January 4, 2001 through September 30, 2001 (269 days ÷ 7 days per week = 38.43 weeks) yields a total entitlement of $2,417.16 (38.43 weeks x $62.90 = $2,417.16). Claimant's $76.30 weekly compensation rate for the 13-week period from October 1, 2001 through December 31, 2001 (91 days ÷ 7 days per week = 13 weeks) yields a total entitlement of $991.90 (13 weeks x $76.30 = $991.90). Claimant's $76.50 weekly compensation rate for the 38.86-week period from January 4, 2001 through September 30, 2001 (272 days ÷ 7 days per week = 38.86 weeks) yields a total entitlement of $2,972.57 (38.86 weeks x $76.50 = $2,972.57). Claimant's $88.35 weekly compensation rate for the 13-week period from October 1, 2002 through December 31, 2002 (91 days ÷ 7 days per week = 13 weeks) yields a total entitlement of $1,148.55 (13 weeks x $88.35 = $1,148.55). Claimant's $54.27 weekly compensation rate for the 21.00-week period from January 1, 2003 through May 28, 2003 (147 days ÷ 7 days per week = 21.00 weeks) yields a total entitlement of $1,139.67 (21.00 weeks x $54.27 = $1,139.67). Thus, the sum of each period after January 4, 2001 yields $8,669.85 ($2,417.16 + $991.90 + $2,972.57 + $1,148.55 $1,139.67 = $8,669.85).

merit, and overlooks the abundance of jurisprudence unquestionably establishing that an award of attorney's fees is inappropriate where the Claimant has not been successful. See e.g., Hensley, supra Perkins, supra; Luke, supra.

Counsel also avers he is entitled to an award because he alleges Employer/Carrier alternatively argued that, in the event the undersigned found any award to be appropriate, it should have been a de minimis award to allow for the possibility Claimant's condition might change. I find Employer/Carrier's alternative argument does not diminish Counsel's failure to successfully prosecute Claimant's claim on remand.

In Hensley, supra at 435, the Supreme Court specifically noted, "Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters." By implication, the failure to reach Employer/Carrier's alternative grounds when substantial evidence supported Employer/Carrier's argument that Claimant's residual wage-earning capacity should be higher is not a sufficient reason to award a fee when Employer/Carrier generally obtained the results they desired on remand.

Moreover, Counsel's argument fails to diminish the fact that Claimant was entitled to less compensation benefits on remand than those awarded in the October 3, 2001 Decision and Order. A failure to reach Employer/Carrier's alternative argument did not result in additional benefits obtained, but simply reduced the magnitude of Claimant's loss, which is, nevertheless, a loss.

Similarly, it is noted that Counsel offered an alternative argument on remand that Claimant's residual wage-earning capacity should reflect changes in the national average weekly wage since the date of his job injury. It is further noted that the Order on Remand adjusted Claimant's residual wage-earning capacity downward to reflect increases in the national average weekly wage, which resulted in slightly lower residual wage-earning capacity. Assuming **arguendo** that Counsel would allege the adjustments to Claimant's residual weekly wage-earning capacity amounts to a "successful prosecution" under the Act, I find this argument, which fails to consider the much greater compensation award in the October 3, 2001 Decision and Order, is without merit.

Moreover, Claimant's alternative argument did not affect the outcome of the Order on Remand because the undersigned was required under Sections 8(c)(21) and 8(h) of the Act to adjust Claimant's post-injury wages to represent the wages which his job paid at the time of his injury. See Richardson v. General Dynamics Corp., 19 BRBS 48, 49 (1986); and Bethard v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 691, 695 (1980). Accordingly, I find Counsel's alternative argument is insufficient to establish a "successful prosecution" under the Act. See generally Avondale Industries, Inc v. Davis, 348 F.3d 487 (2003) (the Court remanded a $15,500.00 attorney's fee award for a determination whether the award was commensurate with an award of future medical benefits and a $736.50 total recovery which was merely the result of an application of penalties and interest by the administrative law judge).

Lastly, Counsel, who notes the absence of authoritative support for his position and who concedes Employer/Carrier successfully appealed the October 3, 2001 Decision and Order, argues he successfully defended, "in part," Claimant's entitlement to continued compensation. He argues the instant claim is analogous to successfully defending Claimant's entitlement to benefits on appeal, which is considered a successful prosecution, relying on Hensley v. Washington Metro Transit Auth., 690 F.2d 1054 (D.C. Cir. 1982) (an attorney was entitled to a fee award for successfully opposing a writ of certiorari); Smith v. Alter Barge Line, Inc., 30 BRBS 87, 89 (1996) (the Board affirmed an administrative law judge's award of death benefits and awarded the claimant's attorneys' fees for their services in obtaining a successful prosecution); and Moody v. Ingalls Shipbuilding, Inc., 29 BRBS 63 (1995) (the Board denied a reconsideration request of its earlier affirmation of an administrative law judge's award of an attorney's fee where the Claimant was successful on every issue, Moody v. Ingalls Shipbuilding, Inc., 27 BRBS 173 (1994) (Brown, J., dissenting); the Board also awarded the claimant's counsel an attorney's fee related to services before the Board in defense of his original fee petition).

Likewise, Counsel argues the instant matter is analogous to the successful defense of a motion for modification, which is similar to successfully defending an appeal of a favorable decision and order awarding benefits, relying on Reiter v. Brady-Hamilton Stevedores, 30 BRBS 208 (ALJ), 212 (ALJ) (1996) (an employer unsuccessfully sought modification under Section 22 of the Act by alleging the claimant earned a 1994 average weekly wage which was more than three times $520.00, his average weekly

wage at the time of his 1978 injury); Butorovich v. Eagle Marine Services, 31 BRBS 621 (ALJ), 630 (ALJ) (1997) (an employer unsuccessfully sought modification under Section 22 of the Act by alleging the claimant's post-injury earning capacity has increased, and that his pre-injury average weekly wage should be adjusted to account for the effects of inflation); and Kinlaw v. Stevens Shipping and Terminal Co., 33 BRBS 68, 75 (1999) (the Board affirmed an administrative law judge's denial of an employer's request for modification under Section 22 of the Act and affirmed the award of an attorney's fee related to the claimant's attorney's successful defense against the modification request).

I find the cases upon which Counsel relies are inapposite to the facts presented in this matter. None of those matters involve an attorney who achieved less entitlement to compensation benefits in subsequent proceedings on remand or on appeal. Accordingly, I find Counsel failed to establish entitlement to the attorney's fee which was awarded on November 20, 2003. A finding that Counsel failed to establish entitlement to the November 20, 2003 award supports a conclusion that Counsel failed to defend the fee petition which precludes an award for his January 23, 2004 supplemental fee petition.

ORDER

IT IS HEREBY ORDERED based on the foregoing that Counsel's September 9, 2003 fee petition and January 23, 2004 supplemental fee petition are hereby **DENIED.** The November 20, 2003 Supplemental Decision and Order Awarding Attorney's Fee is hereby **RESCINDED.**

ORDERED this 19th day of February, 2004, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge